

March 16, 2006

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Ed Aguilar
Date of Filing: February 10, 2006
Case Number: TFA-0148

This Decision concerns an Appeal that was filed by the Mr. Ed Aguilar from a determination issued to him by the Richland Operations Office (Richland) of the Department of Energy (DOE). In that determination, Richland denied a request for a document that Mr. Aguilar submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004, and the Privacy Act (PA), 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. In his Appeal, he seeks the release of the requested document.

In his FOIA/PA request, Mr. Aguilar sought access to “the complete CH2M Hill Hanford Group (CHG) sexual harassment report done by investigator Ms. Rebecca Dean.” Appeal at 1. In its determination, Richland stated that under CHG’s contract with the DOE, all employment-related records, including those of employee-related investigations, are the property of CHG and are therefore not subject to the FOIA or the PA. Richland therefore denied the request. In his Appeal, Mr. Aguilar contests this determination.

The FOIA generally requires that documents held by federal agencies be released to the public on request. The Act does not, however, specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the U.S. Supreme Court in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are “agency records” for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *See also William H. Payne*, 27 DOE ¶ 80,125 (1998). Under the FOIA, “agency” means any “executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency.” 5 U.S.C. § 552(f).

The PA generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Act defines a “system of records” as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by

some identifying number, symbol, or other identifying particular assigned to the individual.” 5 U.S.C. § 552a(a)(5). The PA adopts the FOIA definition of “agency” set forth in the preceding paragraph. 5 U.S.C. § 552a(a)(1).

During the course of our consideration of this Appeal, we contacted Richland for further information. We were informed that no document such as that requested by Mr. Aguilar was created by the DOE or has been in the possession or control of the DOE. Moreover, Mr. Aguilar does not contend, nor do we find, that CHG, a privately-owned and operated DOE contractor, is an “agency.” Consequently, the document requested by Mr. Aguilar would not be an agency record for purposes of the FOIA or part of an agency system of records for purposes of the PA.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. “When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor,” unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). We have examined the CHG contract. Under section I.109 of that agreement, employment-related records, such as “workers’ compensation files, employee relations records, records on salary and employee benefits, drug testing records, labor negotiation records, records on ethics, employee concerns, and other employee-related investigations conducted under an expectation of confidentiality” are the property of the contractor. Therefore, records of investigations such as that requested by Mr. Aguilar are the property of CHG, and are not subject to release under the PA, the FOIA, or the DOE’s records regulation. We will therefore deny Mr. Aguilar’s Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Mr. Ed Aguilar, OHA Case Number TFA-0148, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 5 U.S.C. § 552a(g)(1) (PA). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 16, 2006